

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
Second Appeal No.10 of 1990

Pukhraj Rupchand Jain
since deceased by his LRs
Gulabbai Pukhraj Jain ..Appellant

V/s

Municipal Corporation of City
of Thane ..Respondent

Shri P.S.Dani for Appelant
Shri P.M.Pradhan for Responent

CORAM:S.R.SATHE, J.

DATED:3rd August 2004

ORAL JUDGMENT :-

1. Being aggrieved by the judgment and order passed in Civil appeal No.213 of 1983 whereby the order regarding dismissal of the suit passed in Regular Civil Suit No.415 of 1976 was confirmed and the appeal was dismissed, the original plaintiff has filed the present second appeal. For the sake of convenience hereinafter parties shall be referred to as the plaintiff and defendant.

2. Brief facts giving rise to this appeal are as under :

. According to the plaintiff piece of land bearing Survey No.368A Hissa no.13 admeasuring 2 gunthas and 6 annas corresponding city survey number of which is numbered 20/3 Tikka No.16 situated at Panchpakhadi, Thane, was originally owned by one Viduthrao Yeshwasnt Desai. The said land was attached in execution proceedings filed against Viduthrao. The auction of the said land took place on 10-9-1959 and said land was purchased by one Mohanlal Chagmalji and accordingly certificate was issued in his favour. By virtue of registered sale deed dated 9-10-1961 the plaintiff purchased the said property and accordingly got possession of the said land. However the defendant Municipal Council illegally started construction in the suit land and therefore plaintiff filed Regular Civil Suit No.440 of 1972 in the Court of Joint Civil Judge, S.D., Thane. The defendant Municipal Council filed written statement and contended that the plaintiff was not the owner of the suit land nor the land was in his possession as alleged. On the pleadings of parties the trial Court framed the issues and after considering the evidence

adduced by both the parties the trial Court came to the conclusion that the plaintiff was not the owner of the suit land nor he was in possession and as such dismissed the plaintiff's suit. The plaintiff did not prefer any appeal against the said decision. However, in the year 1976 plaintiff filed the present suit alleging therein that defendant Municipal Council by illegally entering upon plaintiff's land constructed sheds and some of the sheds are given to other persons. The plaintiff, therefore, sought declaration about his title to the suit property and also claimed possession of the suit land. The defendant Municipal Council filed its written statement and raised several contentions. Firstly they contended that identical suit bearing Regular Civil Suit No.440 of 1992 was filed by the plaintiff against the defendant and the same was finally decided on merits in which it was held that plaintiff is not entitled for declaration and possession of the suit land. The defendant, therefore contended that the present suit is barred by principle of res judicata. The defendant also contended that the suit land is not owned and possessed by plaintiff. On the contrary the land in question is owned and possessed by the defendant. On these pleadings the trial Court framed issues at Exh.24. After considering the evidence adduced by both the

parties the trial Court held that suit is barred by principle of res judicata. Besides this the trial Court also held that the plaintiff has failed to prove that he is the owner of the suit property. Naturally the trial court dismissed the plaintiff's suit. Being aggrieved by the same the plaintiff filed Civil Appeal No.213 of 1983. After hearing arguments of both the Advocates, the learned first Appellate Court held that the suit was barred by principle of res judicata. Not only that the Court also observed that suit was barred by provisions of Order 2 Rule 2 of Civil Procedure Code and finding recorded by learned trial Court was correct and therefore dismissed the appeal.

3. The Appellants filed the present second appeal and challenged the above order.

4. In this appeal before me Mr.P.S.Dani, learned Advocate for the Appellant has urged only two points. Firstly, he submitted that in the earlier suit i.e. Suit No.440 of 1972 there was no question of title of the plaintiff. It was a suit simplicitor for injunction and as such it cannot be said that finding recorded by the trial Court in that suit with regard to the title of the plaintiff to suit property operates as res

judicata so far as second suit is concerned. He

also canvassed before me that the learned trial Court had in fact observed that the plaintiff is the owner of the land bearing Survey NO.369-A 13 and had observed that plaintiff had only failed to prove that the said land was subsequently numbered as Survey NO.29/3 Tikka No,16. So under such circumstances it cannot be said that the trial Court had in fact held that the plaintiff was not owner of the suit land. He therefore submitted that finding recorded by the trial Court as well as the first appellate Court to the effect that the suit is barred by principle of res judicata is incorrect. He also argued before me that earlier suit was simplicitor injunction, there was no question of claiming possession or seeking declaration about the title. As against this the subsequent suit No.415 of 1976 was specifically for declaration of the title and possession on the ground that the defendant Municipal Council has made encroachment and constructed shed. He, therefore, submitted that finding recorded by the learned appellate Court regarding application of Order 2 Rule 2 of CPC is also incorrect. He therefore, submitted that appeal be allowed and orders passed by both the Courts be set aside and suit for declaration and possession be decreed.

5. As against this, Mr.Pradhan, learned Advocate for the defendant Municipal Council supported the judgment and order passed by both the courts below and prayed for dismissal of the appeal.

6. From perusal of judgments of the lower Courts as well as from the submissions made before me and the order passed by this Court at the time of admission, it is very clear that substantial question of law involved in this appeal is firstly whether the suit is barred by principle of res judicata in view of earlier decision in Regular Civil Suit No.440 of 1972. Whether the suit is barred by provisions of Order 2 Rule 2 of CPC and whether the plaintiff has proved that he is owner of the suit land.

7. It is an admitted fact that parties to Regular Civil suit no.440 of 1972 and parties to Regular Civil Suit no.416 of 1976 are same. It is also not in dispute that suit property mentioned in both the suits is also same. It is true that in earlier suit the plaintiff had only claimed permanent injunction against the defendant alleging that defendants have commenced construction on the plaintiff's land. However, it has to be mentioned that defendant had taken

out a specific plea that suit land is not owned and possessed by the plaintiff and on the contrary the defendant was all along in possession of the same and plaintiff has no title to the suit premises. Having regard to the contention raised by the defendant, the learned trial Court had framed issues in which a specific issue viz. Does the plaintiff prove that he is the owner of the above property and was in possession of the same, was framed by the learned trial Judge. The learned Advocate for the Appellant tried to convince me that finding recorded on the basis of pleadings of the parties, it cannot be said that the question of possession was a substantial question involved in earlier suit and as such it cannot be said that finding recorded on the said issue amounts to res judicata. It is needless to say that for determining the controversy between the parties and to find out whether the plaintiff was in fact entitled to permanent injunction as sought, it was necessary to frame the issue regarding title of the plaintiff's property or in other words to find out whether the suit land is owned and possessed by the plaintiff, such issue was framed. So I am not inclined to accept the argument of the learned Advocate for the plaintiff in this behalf.

8. While considering this issue, it would be worthwhile to see what Section 11 of C.P.C. says. It runs as follows :-

Section 11: Res judicata - No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I- the expression "former suit" shall denote a suit which has been decided prior to the suit i question whether or not it was instituted prior thereto.

Explanation II - For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III - The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV - Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V - xx x

. Keeping in mind the above position, if we consider the facts of the present suit, it is very clear that in earlier suit there was a specific issue with regard to the ownership of the suit land and same was finally decided against the plaintiff. In the instant suit also there is a issue with regard to plaintiff's ownership of the suit land. As the said issue was finally decided between the same parties, the finding recorded by the learned trial Court as well as appellate Court is legal and correct.

9. So far as the provision of Order II Rule 2 is

concerned, it runs as follows :-

Order II Rule 2: (1) Suit to include the whole claim - (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause

of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim - Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs - A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

10. From the above, it is very clear that Order

2 Rule 2 is for the purpose that defendants should not be faced twice for the same cause. In order to succeed regarding objection under Order 2 Rule 2 it has to be established that second suit was in respect of same cause of action as that on which the previous suit was based. Secondly, it must be established that it was in

respect of that cause of action for which the plaintiff was entitled to claim more than one relief. Lastly it is to be seen that when the plaintiff was entitled for more than one relief he, without obtaining leave from the Court to sue for relief for which the second suit has been filed suit only for one relief. From the perusal of the judgment of the trial Court as well as appellate Court it is very clear that there is lot of evidence to establish that when the plaintiff filed the earlier suit merely for permanent injunction, he was in fact not in possession of the suit land and the defendant had already constructed some sheds and consequently was in possession of the same. In fact the plaintiff has admitted that since the year 1969 that is much prior to filing of earlier suit the plaintiff was not in possession of the suit land. In fact there is also no evidence to show that plaintiff's predecessor in title had in fact received the possession of the suit land through

Court when he purchased the land in action. When such was the position, it was absolutely essential for the plaintiff to claim relief of possession in the earlier suit but he failed to do so and also did not obtain leave of the Court at that time. In fact if we peruse the cause of action that is mentioned by the plaintiff in the earlier suit which is set out in para 6 of the

plaint, We find that such cause of action as well as cause of action setting out in para 10 of the present suit is the same. In both the paras plaintiff has mentioned "cause of action for the suit, first arose on 10-11-1972 and it arose every day thereafter." From the averments in the plaint of the earlier suit it is clear that on the day when the said suit was filed the plaintiff was in fact not in possession. So the first Appellate Court rightly observed that it was in fact necessary for the plaintiff to claim possession of the suit property in earlier suit but he failed to do so and as such the present suit is barred by Order 2 Rule 2 of C.P.C.

11. From the perusal of the record it is every clear that both the Courts below and even the trial Court deciding Regular Civil Suit NO.440 of 1972 have clearly mentioned that the plaintiff has failed to prove that he is the owner of the

suit land. It is true that at once stage the trial Court while deciding Regular Civil Suit No.440 of 1972 made one stray observation that plaintiff is the owner of the land bearing Survey NO.369-1-3. However, if we read the entire judgment, then it is evident that what ultimately the lower Court wanted to observe is that the plaintiff has failed to prove that he is the owner of the suit land suit land mentioned in both the suits is the same. I think that some stray observations made by the lower Court with regard to ownership will not come in the way of the defendant-respondent.

12. In this view of the matter, I think that there is no substance in the present appeal. The appeal is dismissed with costs.

Certified copy expedited.

(S.R.SATHE, J.)